SUPREME COURT, U. S.

MAY 18 1972

MICHAEL RODAK, JR., CLERK

No. 71-1228

In the Supreme Court of the United States

OCTOBER TERM, 1971

SPENCER O. WALKER and RUBEN IVERY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners were convicted in the Middle District of Georgia of conspiracy to defraud the United States by the manufacture and transportation of non-tax-paid whiskey, in violation of 26 U.S.C. 5601 and 7206. Walker was sentenced to imprisonment for four years and Ivery to imprisonment for two years. The court of appeals affirmed *per curiam* (Pet. App. A).

Petitioners' sole contention is that there was a fatal variance between the indictment and the proof in that, although the indictment charged one conspiracy, the proof allegedly showed several conspiracies relating to petitioners' involvement in the whiskey business with different individuals. The court of appeals correctly rejected this contention on the ground that the evidence showed that petitioners were involved in all three of the allegedly separate conspiracies. See *Canella* v. *United States*, 157 F. 2d 470, 478-479 (C.A. 9), where the court affirmed the conviction of a defendant who had participated in all the multiple conspiracies which had been charged as a single conspiracy count while reversing with respect to those defendants who were involved in only some of the separate conspiracies.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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